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No. 642

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Supreme Court of the United States

October Term, 1966

BALTIMORE AND OHIO RAILROAD COMPANY, et al.,

Appellants

v.

UNITED STATES OF AMERICA, et al.,

Appellees

On Appeal from the United States District Court for the Southern District of New York

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MOTION TO ADVANCE

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Come now appellants Baltimore and Ohio Railroad Company, et al., referred to generally by the court below as the "unprotected railroads," and pray that this Court enter an order setting an expedited procedure for the determination of the appeal in this extraordinary case.

In support of this motion appellants respectfully show as follows:

1. This is an appeal from an order of a three-judge court denying an interlocutory injunction against an order of the Interstate Commerce Commission permitting immediate consummation of a merger of the Pennsylvania Railroad and the New York Central Railroad. The background facts and the nature of the very substantial questions presented by this appeal are set forth in the Jurisdictional Statement which is incorporated by reference herein to avoid repetition.

2. The Penn-Central merger is the largest corporate merger in history. Pennsylvania is the largest railroad in the country and New York Central is the third largest railroad in the country and second largest railroad in the East. A merged Penn-Central would dominate the Eastern railroad market by starting out with more than half of the Eastern railroad business, and it would be well over twice the size of any other competitor. The very consummation of the Penn-Central merger would make a shambles of the balance of the Eastern railroads unless the merger can be so conditioned as to protect these carriers pending a restructuring of the East to enable the balance of the Eastern railroads to meet Penn-Central competition.

3. The Commission itself acknowledged that protection of other Eastern railroads was an essential condition to consummation of the Penn-Central merger. However, the principal legal issues on this appeal arise from the extraordinary situation that, despite the established need for protection, the Commission has issued an order permitting immediate consummation of the Penn-Central merger although deferring to a further hearing and order the determination of what, if any, protective conditions can be devised to accomplish the protection found to be essential.

4. The three-judge court below held, one judge dissenting, that the Commission's order permitting immediate consummation of the Penn-Central merger was lawful. The court below recognized that the legal issues must be decided before consummation of Penn-Central, and undertook to decide these issues in denying

the motions for interlocutory injunction (J.S., pp. A-15, A-16). It is equally true that, unless this Court decides the legal questions presented by this appeal before the Penn-Central merger is consummated, these issues will become moot.

5. In order to preserve the jurisdiction of this Court pending appeal, appellants have filed an application for stay before the Circuit Justice for the Second Circuit. The immediate threat of consummation of the Penn-Central merger, the expressed desire of the Commission for expeditious action, and the necessity for determination of the issues by this Court prior to consummation of that merger, suggest the establishment of a procedure that would accommodate the desire for expedition with the preservation of this Court's jurisdiction to decide the critical legal issues presented in respect to this unprecedented merger. For these compelling reasons, appellants file this motion asking the Court to set an expedited procedure for the consideration of both the Jurisdictional Statement and the merits of this appeal.*

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*In *Hannah* v. *Larche*, 361 U. S. 910 (1959), upon consideration of a motion to advance, the Court set brief dates for appellants and for appellees and set the case for early oral argument on the jurisdictional papers and on the merits of the case. In *Stack* v. *Boyle*, 342 U. S. 1, 4 (1951), the Court issued an order setting an expedited schedule upon reference to the Court of an application for interim relief and prior to the filing of the jurisdictional papers.

WHEREFORE, appellants pray that an order be entered setting dates for the filing of briefs by appellants, and by appellees, and setting the case for oral argument on the jurisdictional papers and on the merits.

Respectfully submitted,

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